UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

E. LORRAINE COLBERT, Plaintiff, v. ELAINE CHAO, Secretary, United States Department of Labor, Defendant.	Civil Action No. 99-0625 DAR

MEMORANDUM OPINION AND ORDER

Plaintiff, an African-American woman over the age of 40, brings this action against her employer for alleged violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq., and the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 623(a)(1). Plaintiff alleges "discrimination, based [on] race, and retaliation for complaining about discrimination[,]" and age discrimination. Complaint, ¶¶ 1-2. Pending for determination by the undersigned United States Magistrate Judge is Defendant's Motion for Summary Judgment (Docket No. 41). Upon consideration of the motion, the memoranda in support thereof and in opposition thereto and the entire record herein, defendant's motion will be granted.

BACKGROUND

Plaintiff is an African-American woman, who, at the time of the filing of the complaint, was 51 years old and had been an employee of the Department of Labor for almost 24 years.

Complaint, ¶¶ 7-8. Plaintiff has held the GS-14 position of Chief, Division of Legislative Affairs, Office of Safety and Health Administration ("OSHA"), since 1992. Complaint, ¶ 9. Plaintiff alleges that she was "one of few African-Americans at the GS-14 level or above" at the Washington, D.C. office of OSHA. Complaint, ¶ 10. Plaintiff further alleges that "because of her race, African-American, and her age, over forty, she has been denied the 'terms, conditions, or privileges' of being a division chief at OSHA." Complaint, ¶ 11. Plaintiff also claims that "[w]hite division chiefs, who had previously held [her] position, received the support of their supervisors and were later promoted to positions at the GS-15 level and above." Complaint, ¶ 13.

Plaintiff states that from 1992 to 1995, she worked under the supervision of Tadd Linsenmeyer. Complaint, ¶ 28. After Mr. Linsenmeyer retired in 1995, Frank Frodyma became plaintiff's immediate supervisor. Complaint, ¶ 29. Plaintiff claims that Mr. Frodyma "[i]mmediately . . . delegated [her] job duties to her younger, white, female staff members." Complaint, ¶ 29. In 1997, Craig Obey became plaintiff's immediate supervisor, and "continued the practice of delegating [her] job duties to younger, white, women." Complaint, ¶ 30.

Plaintiff also alleges that since 1995, her supervisors "deliberately bypassed her" by allowing "her younger, white female staff members" to report directly to her supervisors; assigning projects to her staff members without her knowledge; directing her staff members, instead of her, to attend, and on occasion, conduct "important meetings"; allowing her staff members to transfer to different offices without her knowledge or consent; and "sending important documents directly to her staff and vice versa, without even sending her copies of these documents." Complaint, ¶¶ 17-21.

Plaintiff alleges that "one of the younger, white, female staff members," Celeste

Monforton, "began to openly defy [her] authority, in what amounted to blatant acts of insubordination." Complaint, ¶ 23. Plaintiff states that she complained to Mr. Frodyma about Ms. Monforton's behavior, and while Mr. Frodyma "acknowledged Ms. Monforton's behavior[,] . . . [he] refused to authorize disciplinary action and told [her] that she would just have to get used to Ms. Monforton's behavior because she is young and aggressive." Complaint, ¶ 24.

In 1996, plaintiff complained to OSHA's management review group, which, according to plaintiff, determined that "there was no legitimate reason for taking away [her] job duties." Complaint, ¶ 25. Plaintiff alleges that "[a]t this point, the relationship between [her] and her supervisors grew openly hostile[,]" and that "[o]n one occasion, she overheard her supervisor, Frank Frodyma, making derogatory comments about her to the office's director. Rumors were circulated that [plaintiff] was not a competent manager." Complaint, ¶ 26.

Plaintiff alleges that she nevertheless continued to receive "'highly effective' job performance ratings, performance awards, and commendations[,]" and that "[n]one of her supervisors mentioned any deficiencies in her job performance." Complaint, ¶ 27.

Plaintiff states that in May, 1998, she filed an EEO complaint in which she alleged discrimination based on her race and age. She alleges that "[i]n response, "Mr. Obey, [her] current supervisor[,] has become openly hostile towards her by banging his fist and shouting at her on several occasions." Complaint, ¶ 31.

Plaintiff claims that

> [a]s a result of the entire experience, [she] has suffered prolonged mental and emotional pain and suffering. [She] experienced anxiety, stress, humiliation, embarrassment, and loss of enjoyment, which caused her to become depressed and seek medical attention.

Complaint, ¶ 32. As part of her prayer for relief, plaintiff seeks "appropriate backpay [sic] and reimbursement for lost pension, social security, experience, training opportunities and other benefits in an amount to be shown at trial[.]" Complaint, Prayer (2). However, nowhere in her complaint does plaintiff allege that she lost any salary or benefits.

Defendant moved to dismiss the complaint for lack of subject matter jurisdiction, and argued that plaintiff had failed to exhaust her administrative remedies. The Court (Oberdorfer, J.) denied the motion. See October 22, 1999 Memorandum and Order. Defendant filed an answer, then moved for judgment on the pleadings on the ground that "plaintiff's allegations of retaliation and discrimination are not cognizable 'adverse personnel actions' as that term recently has been clarified by the D.C. Circuit in Brown v. Brody[.]" Defendant's Motion for Judgment on the Pleadings at 1. The undersigned denied the motion by an Order entered on September 28, 2000, finding that the issue of whether plaintiff could prove any set of facts which would entitle her to relief could not be determined solely from consideration of the pleadings. See September 28, 2000 Order at 4.

CONTENTIONS OF THE PARTIES

In the memorandum in support of her motion for summary judgment, defendant submits that "[p]laintiff has not provided a shred of evidence that any of Defendant's actions were motivated by Plaintiff's race, age, or involvement in protected EEO activity." Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment ("Defendant's Memorandum") at 2. More specifically, defendant maintains that "[p]laintiff cannot demonstrate that her supervisors treated her differently from similarly situated employees outside her protected

group[,]" or that she was subjected to any "'adverse employment action,' as that term was clarified by the Court of Appeals in Brown v. Brody[.]" Id.; see Defendant's Memorandum at 14-16. Finally, defendant maintains that even assuming, arguendo, plaintiff is deemed to have made out a prima facie case of discrimination, she cannot rebut OSHA's legitimate, non-discriminatory reasons for its actions. Defendant's Memorandum at 9, 16-18.

With respect to the application of Brown v. Brody, defendant maintains that plaintiff "does not contend that she experienced any diminution of salary, benefits, or grade." Defendant's Memorandum at 11; see id. at 9-14. Defendant suggests that while the removal of an employee's duties could constitute an adverse employment action if shown to affect the terms, conditions or privileges of her current employment or future employment opportunities, plaintiff cannot make such showing, since she admits that she has retained many of the duties of a GS-14 supervisor. Defendant's Memorandum at 13. With respect to plaintiff's allegations of race discrimination, defendant maintains that "[p]laintiff concedes that neither Mr. Frodyma nor Mr. Obey ever made any statements indicating racial bias[,]" and indeed acknowledges that "older **white** employees were treated badly, just as she was." Defendant's Memorandum at 18 (emphasis in original).

With respect to plaintiff's allegations of age discrimination, defendant claims that "there is no evidence in the record that either Mr. Frodyma or Mr. Obey ever made derogatory comments about older employees[,]" or that they "made reference to her age, encouraged her to retire, or otherwise made statements reflecting bias against older employees." Defendant's Memorandum at 17. Defendant submits that "Mr. Frodyma's characterization of the Outstanding Young Scholars and Presidential Management Interns as 'young, highly-motivated individuals,' without anything more," is insufficient to demonstrate that plaintiff was subjected to discrimination on

account of her age, or to rebut defendant's legitimate non-discriminatory reasons for the challenged actions. Id.

Defendant further asserts that plaintiff's failure to allege any adverse employment action is also fatal to her retaliation claim. Defendant's Memorandum at 18-19. Defendant submits that plaintiff's allegation that her supervisor "bang[ed] his fist and shout[ed] at her on several occasions" is not a basis upon which the court could find that plaintiff has made out a prima facie case of retaliation. Defendant's Memorandum at 19. Defendant also maintains that plaintiff has failed to show any nexus between the conduct alleged and her filing of an EEO complaint. Defendant's Memorandum at 19 n.5.

Finally, defendant asserts that even if plaintiff's age discrimination claims were to survive this motion for summary judgment, "her request for compensatory damages and for a jury trial should be denied, because Plaintiff is not entitled to such relief under the ADEA." Defendant's Memorandum at 19.

Defendant includes with the motion for summary judgment and memorandum of points and authorities a separate Statement of Material Facts as to Which There is No Genuine Issue. Each fact set forth therein is followed by a citation to plaintiff's complaint, or to one or more of the nine exhibits which are a part of the record, and accompany the statement.

Plaintiff, in her opposition, maintains that she "has provided testimony and discovery documentation supporting her contention that Defendant's actions were motivated by Plaintiff's race, age, and/or involvement in protected EEO activity." Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment ("Plaintiff's Opposition") at 5. Plaintiff submits that "[a]t the very least this testimony and documentation

[raise] genuine issues of material fact as to the extent of adverse employment action against Plaintiff, her disparate treatment at the hands of her supervisors, and her supervisors' retaliatory actions as a result of her seeking EEO protection." Id.

With respect to the application of Brown v. Brody, plaintiff maintains that "[d]efendant's blind reliance on Brown and its progeny is misplaced." Plaintiff's Opposition at 15. Plaintiff further argues that "Brown and its progeny do not, as a matter of law, negate Plaintiff's claim that Defendant's actions constitute adverse employment actions[,]" and that "sufficient evidence exists that a reasonable trier of fact could find for Plaintiff that these actions deprived her of certain 'terms, conditions, or privileges of her employment or her future employment opportunities.'" Plaintiff's Opposition at 15-16. Additionally, plaintiff contends that she "has provided sufficient testimony and documentation supporting her allegations of adverse employment action[,]" and that "defendant's evaluation of each incident in isolation ignores the totality of the work conditions endured by Plaintiff, the affront to her authority and position, and the adverse consequences to her career advancement." Plaintiff's Opposition at 16-17.

With respect to her age discrimination claim, plaintiff concedes that "there is no right to a trial by jury in age discrimination suits against the federal government; however, Plaintiff notes that the ADEA does provide for liquidated damages in cases involving willful violations of the Act and intends to present evidence of the willful acts and the damages suffered." Plaintiff's Opposition at 20-21. Plaintiff also "moves this Court for leave to amend her Complaint to clarify the legal and equitable remedies sought in this action." Plaintiff's Opposition at 21.

In addressing defendant's contentions regarding the legitimate, non-discriminatory reasons for her actions, plaintiff states that "Defendant ignores [certain] evidence because it directly

contradicts her purported 'legitimate reason' for divesting Plaintiff of her substantive duties." Plaintiff's Memorandum at 19. Plaintiff submits that because "[n]o documentary evidence" was presented by defendant which supports her contention regarding a legitimate non-discriminatory reason, "summary judgment must be denied." Id.

While plaintiff repeatedly refers to "testimony," "evidence" and "discovery documentation" which raise genuine issues of material fact, she does not identify either the material facts as to which genuine issues exist, or the citations for each proposition on which she relies. Nor is the opposition accompanied by a separate, concise statement of genuine issues. Instead, plaintiff captions the second section of her opposition "Statement of Genuine Issues." See Plaintiff's Opposition at 5-13. The "Statement" consists largely of narrative argument. Some of the propositions incorporated in this section are followed by a citation to a part of the record; others do not include any reference to any part of the record.

In her reply, defendant first contends that plaintiff has not provided "an adequate response to defendant's Statement of Material Facts." Defendant's Reply to Plaintiff's Opposition to Motion for Summary Judgment ("Defendant's Reply") at 2. Specifically, defendant argues that "[plaintiff] does not appear to have included a separate 'Statement of Controverted Facts[,]'" and that the "Statement of Genuine Issues" section of her opposition is "insufficient" under the applicable local and federal rules. Id. Defendant further maintains that "even if this section of plaintiff's opposition is treated as plaintiff's statement of material facts as to which a genuine issue exists, plaintiff has failed to adequately controvert the facts set forth in defendant's Statement of Material Facts." Defendant's Reply at 2-3. Defendant contends that her Statement of Material Facts therefore should be deemed admitted in accordance with Local Civil Rule 7.1(h) and 56(e)

of the Federal Rules of Civil Procedure. Defendant's Reply at 4.

Defendant also observes that plaintiff does not contend that she suffered any diminution of salary, benefits or grade. Defendant's Reply at 5. Defendant submits that notwithstanding plaintiff's claim that she "was prevented from seeking higher level positions[,]" see Plaintiff's Opposition at 9, "there is no evidence in the record that the alleged removal of Plaintiff's duties prevented her from obtaining either a promotion or a job outside the Agency." Defendant's Reply at 7-8. Defendant observes that plaintiff's contention that defendant discriminated against her by failing to promote her to the position of Director of the Office of Intergovernmental Affairs, see Plaintiff's Opposition at 2, 9-10, is not pled in her complaint, and was never the subject of an administrative complaint of discrimination. Defendant's Reply at 8-9.

Defendant also contends that plaintiff fails to establish that similarly situated employees were treated more favorably. Defendant's Reply at 9. Specifically, defendant argues that the burden is on plaintiff, as part of her prima facie case, "to show that the agency treated her differently than similarly situated employees outside her protected group[,]" and that "[p]laintiff's attempt to place this burden on the defendant is untenable." Defendant's Reply at 10.

Next, defendant maintains that plaintiff has not shown that the reasons articulated by defendant for the agency's actions are pretextual. Specifically, defendant submits that she has provided "legitimate justifications" for the agency's actions, and that plaintiff has provided no evidence that the actions of her supervisors were motivated by discriminatory animus. Defendant's Reply at 12-14.

Defendant submits that plaintiff has similarly failed to rebut defendant's contentions with

respect to plaintiff's retaliation claims. Defendant's Reply at 14. Specifically, defendant maintains that plaintiff has not alleged that she experienced a diminution in salary, grade or benefits after she filed her EEO complaint, and has failed to demonstrate any causal connection between the alleged retaliatory conduct and her filing of an EEO complaint. Defendant's Reply at 14-15.

Finally, defendant maintains that plaintiff is not entitled to liquidated damages under the ADEA, and that her request to amend her complaint to add a claim for liquidated damages should be denied. Defendant's Reply at 15-16.

APPLICABLE STANDARDS

Summary Judgment

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Diamond v. Atwood, 43 F.3d 1538, 1540 (D.C. Cir. 1995). The nonmoving party cannot merely rest upon the allegations included in the complaint, and instead, must identify the specific facts which demonstrate that there is a genuine issue for trial. Anderson, 477 U.S. at 248. The burden is upon the nonmoving party to demonstrate that there are material facts in dispute. Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986). There is a genuine issue of material fact "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. Material facts are in dispute if they are capable of affecting the

outcome of the suit under governing law. Id. In considering a motion for summary judgment, all evidence and inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). The "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [her] favor." Anderson, 477 U.S. at 255; see also Bayer v. United States Dept. of Treasury, 956 F.2d 330, 333 (D.C. Cir. 1992).

This Circuit has held that because proof of discrimination may be difficult for a plaintiff to establish, "the court should view summary judgment motions in such cases with special caution." Childers v. Slater, 44 F. Supp. 2d 8, 15 (D.D.C. 1999) (citing Aka v. Washington Hosp. Ctr., 116 F.3d 876, 879 (D.C. Cir. 1997)); see Johnson v. Digital Equip. Corp., 836 F. Supp. 14, 18 (D.D.C. 1993). Nevertheless, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. Rather, she must come forward with "specific facts showing that there is a genuine issue for trial." See Matsushita, 475 U.S. at 587; FED. R. CIV. P. 56(e).

In addition, Local Civil Rule 7.1(h) provides:

> Each motion for summary judgment shall be accompanied by a statement of material facts as to which the moving party contends there is no genuine issue, which shall include references to the parts of the record relied on to support the statement. An opposition to such a motion shall be accompanied by a separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated, which shall include references to the parts of the record relied on to support the statement. . . . In determining a motion for summary judgment, the court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is

> controverted in the statement of genuine issues filed in opposition to the motion.

LCvR 7.1(h) (emphasis added). Thus, this Circuit has held that "[i]f the party opposing the motion fails to comply with this local rule, then 'the district court is under no obligation to sift through the record' and should '[i]nstead . . . deem as admitted the moving party's facts that are uncontroverted by the nonmoving party's Rule [LCvR 7.1(h)] statement." Securities and Exch. Comm'n v. Banner Fund Int'l, 211 F.3d 602, 616 (D.C. Cir. 2000) (citation omitted); see Twist v. Meese, 854 F.2d 1421, 1425 (D.C. Cir. 1988).

Moreover, Rule 56(e) of the Federal Rules of Civil Procedure provides, in relevant part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

FED. R. Civ. P. 56(e). The nonmoving party must therefore

> go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial." . . . Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing[.]

Celotex, 477 U.S. at 324 (emphasis added).

One judge of this Court has held that "legal conclusions 'cloaked' as facts are not sufficient to create a genuine issue of material fact[,]" and that the parties "are obligated, pursuant

to Local Rule [7.1(h)], to identify the material facts and point to evidence of record that supports their respective positions." United States v. BCCI Holdings, 977 F. Supp. 1, 6 (D.D.C. 1997) (citing Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner, 101 F.3d 145, 150-51 (D.C. Cir. 1996)). Accordingly,

> [t]he district court's obligation in examining a Rule [7.1(h)] statement of material facts in dispute, however labeled and wherever it appears in the opposition pleadings, extends therefore only to a determination of whether the party opposing summary judgment has complied with the rule's plain requirements.

Jackson, 101 F.3d at 153. Moreover,

> Rule [7.1(h)] places the burden on the parties and their counsel, who are most familiar with the litigation and the record, to crystallize for the district court the material facts and relevant portions of the record.

Jackson, 101 F.3d at 151.

Proof of Discrimination and Retaliation

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and its progeny established the triparate framework which governs the allocation of the burden of production in cases in which discrimination based on disparate treatment is alleged. This Circuit has held that the McDonnell Douglas framework is also applicable to claims of retaliation, see McKenna v. Weinberger, 729 F.2d 783, 790 (D.C. Cir. 1984), as well as claims of age discrimination under the ADEA. Hall v. Giant Food, 175 F.3d 1074, 1077 (D.C. Cir. 1999); see Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 142 (2000).

To satisfy the first element of the McDonnell Douglas framework, the plaintiff must prove

a prima facie case by a preponderance of the evidence. McDonnell Douglas, 411 U.S. at 802. Generally, to establish a prima facie case of disparate treatment discrimination, a plaintiff must show that he or she (1) belongs to a protected class; (2) suffered an adverse employment action; and (3) that the unfavorable action gives rise to an inference of discrimination. E.g., Brown v. Brody, 199 F.3d 446, 452 (D.C. Cir. 1999) (citing McKenna, 729 F.2d at 789).[1]

In order to establish a prima facie case of retaliation, a plaintiff must show that (1) he or she engaged in a statutorily protected activity; (2) the employer took an adverse personnel action; and (3) a causal connection exists between the two. Id. at 452-453 (citing Mitchell v. Baldridge, 759 F.2d 80, 86 (D.C. Cir. 1985)); accord, Holbrook v. Reno, 196 F.3d 255, 263 (D.C. Cir. 1999). The causal connection element of a prima facie case of retaliation may be established "by showing that the employer had knowledge of the employee's protected activity, and that the adverse personnel action took place shortly after that activity." Mitchell, 759 F. 2d at 86; accord, Carney v. American Univ., 151 F.3d 1090, 1095 (D.C. Cir. 1998).

If a plaintiff succeeds in proving his or her prima facie case, a presumption that the employer unlawfully discriminated against the employer arises, see Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981), and the burden shifts to the defendant "to articulate some legitimate nondiscriminatory reason for the employee's rejection." McDonnell Douglas, 411 U.S. at 802.

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[1] To raise an inference of disparate treatment in a Title VII case, the plaintiff "must prove that all of the relevant aspects of her employment situation are 'nearly identical' to those of the employees who she alleges were treated more favorably." Childers v. Slater, 44 F. Supp. 2d at 24; see Neuren v. Adduci, Mastriani, Meeks & Schill, 43 F.3d 1507, 1514 (D.C. Cir. 1995). To raise an inference of disparate treatment in an age discrimination case, a plaintiff "must point to a worker with a 'significant' or 'substantial' difference in age." Beeck v. Federal Express Corp., 81 F. Supp. 2d 48, 54 (D.D.C. 2000).

Finally, if the defendant successfully carries this burden, then the presumption of discrimination disappears, and the plaintiff "must have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were pretext for discrimination." Burdine, 450 U.S. at 253 (citing McDonnell Douglas, 411 U.S. at 804); see also St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993). At this point, plaintiff's ultimate burden of proving intentional discrimination merges with her burden of demonstrating pretext. Burdine, 450 U.S. at 256. At all times plaintiff retains the ultimate burden of persuading the trier of fact that defendant intentionally discriminated against the plaintiff. Burdine, 450 U.S. at 253.

DISCUSSION

Statement of Genuine Issues

The undersigned finds that plaintiff has failed to comply with either Local Civil Rule 7.1(h) or Rule 56(e) of the Federal Rules of Civil Procedure. First, plaintiff has not included "a separate concise statement of genuine issues[,]" "setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated[,]" which includes "references to the parts of the record relied on to support the statement." See Local Civil Rule 7.1(h). Plaintiff's "Statement of Genuine Issues" section is neither "separate" nor "concise." Rather, it is a narrative section of plaintiff's opposition which is "[r]eplete with factual allegations not material to [plaintiff's] substantive claims[,]" and "[by] repeatedly blending factual assertions with legal argument, the [genuine issues] section does not satisfy the purposes of a Rule [7.1(h)] statement." Jackson, 101 F.3d at 153. For example, the first paragraph of plaintiff's "Statement of Genuine

Issues" reads as follows:

> Defendant attempts to marginalize Plaintiff's allegations of adverse employment action by isolating specific incidents and ignoring the totality of the circumstances presented by Plaintiff in her Complaint and discovery responses and documentation. In her complaint, Plaintiff states that beginning in 1995, OSHA repeatedly denied her the "terms, conditions, and privileges" of being a Division Chief. Her supervisors encouraged and condoned her subordinates' actions to circumvent her authority. Complaint, ¶ 12. Plaintiff found her substantive professional duties usurped by younger, white females at the encouragement of her supervisors. Complaint, ¶ 16. These professional duties were of the type needed for career advancement. Complaint, ¶¶ 18-19. Plaintiff's supervisors actively discouraged her from seeking higher level positions. Complaint, ¶ 14. Other individuals similarly situated to Plaintiff have all advanced to the GS-15 level and beyond. Complaint, ¶ 13.

Plaintiff's Opposition at 5-6 (footnote omitted).

Next, the undersigned further finds that plaintiff has failed to "[set] forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated[.]" See Local Civil Rule 7.1(h). Instead, plaintiff's statement is largely a recitation of the allegations of her complaint, characterizations of the actions of her supervisors and the members of her staff, and argument. For example, plaintiff states that she "was systematically divested of her professional duties after the retirement of her first-line supervisor in 1995[,]" and that "[c]o-workers observed that Plaintiff no longer participated in the 'high profile' activities of the office after Mr. Frodyma became her first-line supervisor[.]" Plaintiff's Opposition at 7. Later, plaintiff states that "negative comments" made by "[Mr. Frodyma] and other OSHA officials[,]" and "the perception that [she] was relieved of her professional duties[,]" "adversely impacted Plaintiff's status and career advancement opportunities." Id. at 9. Plaintiff avers that "Defendant has produced no evidence to support her assertion that these younger participants should benefit at the expense of

Plaintiff or any other staff member other than Mr. Obey's own perception." Id. at 12. However, such allegations, characterizations and arguments cannot satisfy the requirement that a party opposing summary judgment identify "all material facts" as to which that party maintains a genuine issue for trial exists. Local Civil Rule 7.1(h); see Celotex, 477 U.S. at 324; Matsushita, 475 U.S. at 587.

Finally, the undersigned finds that plaintiff has failed to "include references to the parts of the record relied on to support the statement[,]" see Local Civil Rule 7.1(h); nor has she complied with the requirement that the affidavits, deposition excerpts and other materials offered by the nonmoving party constitute competent evidence, and not evidence which is "merely colorable" or "not significantly probative." See Anderson, 477 U.S. at 249-50; Hastie v. Henderson, 121 F. Supp. 2d 72, 77 (D.D.C. 2000); Guardian Life Ins. Co. of Am. v. Madole, 48 F. Supp. 2d 26, 29 (D.D.C. 1999). Plaintiff repeatedly refers to "documents and deposition testimony supporting [her] allegations." See, e.g., Plaintiff's Opposition at 6. However, many of the propositions which she asserts lack any citation; as to other propositions, plaintiff relies upon the allegations of her complaint, her own deposition testimony, or evidence which, at best, supports the proposition in a manner which is tangential. For example, plaintiff relies upon her own deposition testimony in support of the proposition that "[a] management review board agreed with Plaintiff that the substantive duties had been taken from her without good cause." Plaintiff's Opposition at 7. Additionally, plaintiff relies upon documents attached to her opposition as Exhibit 7, which she describes as "examples of significant legislative issues in which Plaintiff had no involvement or knowledge of assignment" to support her contention that she was "systematically divested of her professional duties" after the retirement of her first-line supervisor in 1995. Plaintiff's Opposition

at 7.[2] In other instances, plaintiff attempts to shift to defendant the burden of producing evidence to support plaintiff's contentions. For example, plaintiff states that "Defendant offers no evidence that Ms. Gray's duties and responsibilities are similar in level and content to Plaintiff's." Plaintiff's Opposition at 10.

In sum, the undersigned thus finds that plaintiff's "Statement of Genuine Issues" is nether "'separate nor confined to the facts genuinely in dispute, both of which the [local] rule requires." Interim Services, Inc. v. Interim, Inc., No. CIV.A.00-7113, 2001 WL 418068, at *1 (D.C. Cir. Apr. 20, 2001). Given these "glaring deficiencies" and "plaintiff's blatant failure to comply with the rules, plaintiff's ["Statement of Genuine Issues"] cannot serve to refute any of the specific factual assertions that defendant has proffered." Mack v. Strauss, 134 F. Supp. 2d 103, 108 (D.D.C. 2001). Accordingly, the undersigned finds that the material facts enumerated by defendant in her statement have not been adequately controverted, and thus will be deemed admitted.

Adverse Employment Action

Even assuming, arguendo, that plaintiff complied with Local Civil Rule 7.1(h), her failure to allege that she suffered any "materially adverse consequences affecting the terms, conditions, or privileges of her employment or her future employment opportunities" is fatal to her claims of

[2] Plaintiff's Exhibit 7 is a compilation of documents which includes correspondence from the American Society of Safety Engineers to the Senate Appropriations Committee; a press release by the Department of Labor; a series of proposed amendments to the "SAFE" Act; and a series of memoranda which appear to be authored by the plaintiff noting various "incidents," "observations/points," and "disparate treatment." Plaintiff's Opposition, Exhibit 7. None of these documents satisfy the requirement that the nonmoving party offer competent evidence in an effort to identify the genuine issues for trial. See Guardian Life Ins. Co. of Am., 48 F. Supp. 2d at 29.

discrimination and retaliation. See Brown v. Brody, 199 F.3d at 457. Viewing the evidence in the light most favorable to plaintiff, the undersigned finds that there is no evidence from which a reasonable trier of fact could find that plaintiff "has suffered objectively tangible harm"; indeed, plaintiff's complaint and deposition testimony compel the opposite conclusion. Plaintiff has not alleged that her salary, grade or benefits were reduced as a result of the alleged changes in her duties and responsibilities;[3] nor has she alleged that she was denied a promotion or other opportunity because of the challenged actions.[4]

This court has previously held that in the absence of evidence of "a materially adverse action that undermines her ability to perform her job satisfactorily or threatens her prospects of future employment[,]" see Crenshaw v. Georgetown Univ., 23 F. Supp. 2d 11, 17 (D.D.C. 1998), aff'd, 194 F.3d 173 (D.C. Cir. 1999), an allegation of lost status, respect or prestige does not constitute an allegation of an adverse employment action. See, e.g., Forkkio v. Tanoue, 131 F. Supp. 2d 36, 40 (D.D.C. 2001) (change in plaintiff's title and reporting relationship following a reorganization not an adverse action where plaintiff suffered no decrease in salary or benefits, and maintained the same substantive and supervisory responsibilities); Weigert v. Georgetown Univ., 120 F. Supp. 2d 1, 19 (D.D.C. 2000) (arguably less desirable assignment not an adverse action in the absence of evidence of demotion, less substantial assignments or reassignment affecting terms

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[3] Plaintiff, in her complaint, states that after Mr. Frodyma became her supervisor, she "continued to receive 'highly effective' job performance ratings, performance awards, and commendations. None of her supervisors mentioned any deficiencies in her job performance." Complaint, ¶ 27.

[4] During her deposition, plaintiff acknowledged that she did not apply for other positions between 1992 and 1998, and did not request any transfer prior to requesting an accommodation in 1998. Defendant's Memorandum at 5; Exhibit 1 (Colbert Dep. at 85:13-20).

and conditions of employment); Moore v. Summers, 113 F. Supp. 2d 5, 23 (D.D.C. 2000) (transfer which plaintiff deemed "'negative to her career'" not an adverse employment action where plaintiff did not lose pay or grade, or allege that her duties had been "substantially diminished in any way."). In sum, "minor changes in professional responsibilities . . . 'do not ordinarily constitute adverse employment decisions if unaccompanied by a decrease in salary or work hour changes.'" Campbell v. National Educ. Assoc., No. CIV.A.99-7122, 2000 WL 1584589, at *4 (D.C. Cir. Oct. 3, 2000) (quoting Mungin v. Katten Muchin & Zavis, 116 F.3d 1549, 1556-57 (D.C. Cir. 1997)).

Similarly, communication of disparaging comments to plaintiff, or to her colleagues, see Complaint, ¶ 26, "may be said to evince insensitivity toward the plaintiff, or indeed to be indicative or mismanagement generally"; however, where a plaintiff "fail[s] to demonstrate how her employment status was affected by [such] actions[,]" no adverse employment action can be found to have occurred. Childers v. Slater, 44 F. Supp. 2d at 20; see Simms v. United States Gov't Printing Office, 87 F. Supp. 2d 7, 10 (D.D.C. 2000) (disparaging comments insufficient to establish a prima facie case of retaliation where plaintiff failed to present evidence that he suffered any negative employment consequences); Glovinsky v. Cohen, 983 F. Supp. 1, 3 (D.D.C. 1997) (supervisor's criticism not an adverse action where plaintiff maintained his position, and did not allege that he was denied a promotion or other employment opportunity).

The sole retaliatory action which plaintiff alleges is that after she filed her administrative complaint of discrimination, her current supervisor "has become openly hostile towards her by banging his fist and shouting at her on several occasions." Complaint, ¶ 31. However, this Court has held that "[w]hile the D.C. Circuit has not reached this issue, it is clear that merely being

yelled at by your supervisor does not rise to the level of an adverse employment action." Russ v. Van Scoyoc Assoc., Inc., 122 F. Supp. 2d 29, 32 (D.D.C. 2000) (citations omitted).

For these reasons, the undersigned finds that plaintiff has failed to allege an actionable adverse employment action.[5] Accordingly, there is no evidence from which a trier of fact could find that she has made out a prima facie case of discrimination or retaliation.

Pretext; Evidence Regarding Retaliation Claim

"The focus of [summary judgment] will be on whether [the court] could infer discrimination from the combination of (1) the plaintiff's prima facie case; (2) any evidence the plaintiff presents to attack the employer's proffered explanation for its actions; and (3) any further evidence of discrimination that may be available to the plaintiff (such as independent evidence of discriminatory statements or attitudes on the part of the employer) or any contrary evidence that may be available to the employer[.]" Brown, 199 F.3d at 458 (citations omitted). The undersigned finds that, assuming, arguendo, plaintiff is deemed to have established a prima facie case of discrimination, she cannot "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were pretext for discrimination." Burdine, 450 U.S. at 253.

In her "Statement of Genuine Issues" section, plaintiff asserts that "Defendant has produced no evidence to support her assertion that these younger participants should benefit at the expense of Plaintiff or any other staff member other than Mr. Obey's own perception."

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[5] Upon consideration of this finding, the undersigned finds no need to discuss the evidence with respect to the third element of a prima facie case of discrimination and retaliation. See n.1, supra.

Plaintiff's Opposition at 12. Plaintiff also accuses defendant of "present[ing] contradictory evidence as to whether any 'flattening of the OSHA organization' occurred in the National Office where Plaintiff worked." Id. Plaintiff then argues that "Defendant ignores [certain] evidence because it directly contradicts her purported 'legitimate reason' for divesting Plaintiff of her substantive duties[,]" and that because "[n]o documentary evidence was presented" by defendant which supports its contention regarding a legitimate non-discriminatory reason, then "summary judgment must be denied." Plaintiff's Memorandum at 19.

Thus plaintiff, who has the "ultimate burden of persuasion, [has] offered nothing beyond her own speculations and allegations to refute the [defendant's] legitimate, non-discriminatory reasons for [her] decisions." Brown, 199 F.3d at 458. Because the undersigned is "'not free to second-guess an employer's business judgment,' . . . plaintiff's mere speculations are 'insufficient to create a genuine issue of fact regarding [an employer's] articulated reasons for [its decisions] and avoid summary judgment.'" Brown, 199 F.3d at 459 (quoting Branson v. Price River Coal Co., 853 F.2d 768, 772 (10th Cir. 1988)).

Similarly, plaintiff has entirely failed to point to any evidence from which a trier of fact could find that there is any nexus between her filing of an EEO complaint and the allegedly retaliatory actions of which she complains. Indeed, during her deposition, plaintiff testified that no one, including her supervisors "[said] anything . . . to indicate that they were either mad at [her] because [she] filed an EEO complaint or [that] they were going to retaliate against [her] because [she] had filed an EEO complaint[.]" Defendant's Memorandum, Exhibit 1 (Colbert Dep. at 99:25-100:11). Plaintiff has offered no evidence that the supervisor who allegedly "bang[ed] his fist" and "shout[ed]" at her even knew that she had filed an administrative complaint of

discrimination, or that he engaged in such conduct "shortly after that [protected] activity." See Mitchell, 759 F.2d at 86.

In sum, the undersigned finds that plaintiff has failed to offer either direct evidence of a causal connection between her protected activity and any supposedly adverse employment action, or evidence from which such a causal connection reasonably could be inferred. See Carney, 151 F.3d at 1095.

CONCLUSION

For the foregoing reasons, it is, this _____ day of June, 2001,

ORDERED that Defendant's Motion for Summary Judgment (Docket No. 41) is **GRANTED;** and it is

FURTHER ORDERED that judgment is entered for defendant in accordance with the separate Final Judgment filed on this date.

DEBORAH A. ROBINSON
United States Magistrate Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

E. LORRAINE COLBERT, Plaintiff, v. ELAINE CHAO, Secretary, United States Department of Labor, Defendant.	Civil Action No. 99-0625 DAR

FINAL JUDGMENT

Pursuant to Rules 58 and 79 of the Federal Rules of Civil Procedure, and for the reasons set forth in the Memorandum Opinion and Order filed on this date, it is, this _____ day of June, 2001,

ADJUDGED AND DECREED that final judgment is hereby entered for the defendant.

_____
DEBORAH A. ROBINSON
United States Magistrate Judge